Act.[61] If the Federal Act, by its own language, requires consideration of additional sections, then any failure to reference those sections in the Arkansas Act may be interpreted as by omission by mistake. The purpose of the Arkansas Act may not be defeated by such an omission.[62] MCI has not referenced an order of the Arkansas PSC that fails to comply with federal law due to § 9 (i).

Another interpretation of § 9(i) could be that the legislature intended only the consideration of § 251 issues to be by clear and convincing evidence. Any other review required by the Federal Act would only require a preponderance of the evidence. The Commission should not preempt § 9(i) since alternate interpretations of the text are available.[63]

Any issue concerning the standard of review in § 9 (i) may also be reconciled based upon statutory construction. The standard of proof in § 9(i) may require that if the statement of generally acceptable terms meets federal law requirements (whatever those requirement are), then the Arkansas PSC must accept the SGAT. It is appropriate for a state to make it difficult for its PSC to reject an SGAT that meets federal requirements.

The Arkansas Act is also consistent with the Federal Act with respect to the Arkansas PSC's review of negotiated agreements. The Arkansas Act does not prevent close scrutiny of negotiated agreements. Section 9 (i) does not prevent the review of the negotiated agreements required by the Federal Act. However, once the requirements of the Federal Act are met, then the Arkansas Act makes it difficult for the Arkansas PSC to reject the agreement.

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[61] MCI Petition, p.9.

[62] See Henderson v. Russell, 267 Ark. 140, 589 S.W.2d 565 (1979).

[63] Henson v. Fleet Mortgage Co., 319 Ark. 491, 892 S.W.2d 250 (1995). (If a literal application of the statute would lead to absurd consequences, a literal application of the statute should be rejected in favor of an alternative interpretation which give effect to the statute's purpose.)

4. Section 10 Of The Arkansas Act That Relates To Rural Telephone Companies Does Not Violate The Federal Act.

Section 10 of the Arkansas Act does not violate the Federal Act. Section 10 (a) provides that a rural telephone company shall not have any duty to negotiate with another telecommunications provider "unless and until a telecommunications provider has made a bona fide request to the rural telephone company for such services, and the Commission has determined, **in accordance with the Federal Act**, that the rural telephone company must fulfill such request (Emphasis added)."[64] Section 10 (a) specifically requires the review by the Arkansas PSC be made in accordance with the Federal Act. If, in accordance with the Federal Act, the duty is established, then a rural telephone company has a duty to negotiate with the other telecommunications provider.

The Arkansas PSC, acting in accordance with the Federal Act, must determine whether the rural telephone company should comply with the request of another telecommunications provider. This provision is consistent with the Federal Act. The overriding duty in § 10 (a) is to act in accordance with the Federal Act.

It should be noted the Federal Act does not place the burden of proof on the rural LEC. [65] The Federal Act is silent as to which party has the burden of proof on the criteria that the states evaluate. The Federal Act gives the states the responsibility of deciding if the criteria are met.[66] Congress gives the states the authority to review those criteria. The states should determine how

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[64] Arkansas Act § 10(a).

[65] See 47 U.S.C. § 251.

[66] See, Id.

those criteria are proven since Congress gave the states the right to review those criteria.

If MCI's interpretation of the Arkansas Act and Federal Act are both correct, then the Commission may still interpret the Arkansas Act to be consistent with federal law. For instance, §10 (a) requires the review by the Arkansas PSC to be made "in accordance with the Federal Act."[67] If the § 10 (b) burden of proof is inconsistent with the Federal Act, then §10 (a) and §10 (b) are in internal conflict within the Arkansas Act. Any provision in the Arkansas Act that is inconsistent with the Federal Act is also contrary to legislative intent as set forth throughout the Arkansas Act.. Arkansas rules of statutory construction allow that contradictory clauses in acts to be deleted and disregarded in order to give effect to clear legislative intent.[68] If the Commission applies Arkansas statutory construction, then this alleged inconsistency with federal law may be reconciled by treating as deleted any improper clause.

MCI argues that the Arkansas Act also requires ten (10) additional factors to be considered by the Arkansas PSC in reviewing a CLEC's request for interconnection with a rural telephone company.[69] The ten factors in § 10 (c) are consistent with the Federal Act. The Federal Act allows the state to review interconnection requests to determine whether the request is economically burdensome, technically feasible, and consistent with the protection of universal service. [70]

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[67] Arkansas Act § 10(a).

[68] See City of Fort Smith v. Tate,38 Ark. App. 172, 823 S.W. 2d 262 (1992), aff'd, 311 Ark. 405, 844 S.W.2d 356 (1993).

[69] MCI Petition pp. 12-13.

[70] See 47 U.S.C. § 251.

The ten provisions that MCI finds objectionable are merely sub-parts of the review authorized by the Federal Act. The Arkansas General Assembly provides the Arkansas PSC some guidance to review the allowed criteria. For instance, §10 (c)(5) requires review of "customer costs of telephone service"[71]. "Customer costs of telephone service" is a proper matter to review under protection of universal service. The amount a customer pays for telephone service is directly related to that customer's ability to purchase and maintain telephone service. The other nine provisions also are also subsections of the three criteria allowed by the Federal Act.

5. The Arkansas Act's Provisions Related To Universal Service Are Consistent With The Federal Act.

(a) The Arkansas Universal Service Fund

The Federal Act does not require a state universal service fund be identical to federal universal service fund.[72] The states have not forfeited rights to promote and enforce significant state policy issues in telecommunications. The Arkansas Act establishes the Arkansas Universal Service Fund ("AUSF").[73] This fund is separate from and supplemental to the Federal Universal Service Fund ("FUSF"). Under § 254 (f) of the Federal Act, states may adopt regulations to preserve and advance universal service, if the support mechanisms are appropriate and do not rely on or burden the federal universal service support mechanisms.[74]

The policy considerations supported by the AUSF are consistent with federal law. The

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[71] Arkansas Act § 10(c)(5).

[72] See 47 U.S.C. § 254(f).

[73] Arkansas Act § 4.

[74] See 47 U.S.C. § 254(f).

funding is equitable and nondiscriminatory and paid by all responsible intrastate telecommunications providers.[75] No indication exists that the AUSF will burden the federal support mechanism. The Federal Act does not impose specific cost methodologies on state universal service funds such as the AUSF. States may provide any appropriate support or subsidy to carry out state policy objectives.

MCI ,again, uses the term "barriers to entry" when discussing the AUSF.[76] "Barriers to entry" is not equivalent to directly or indirectly prohibiting an entity from providing a telecommunications service. MCI does not establish the AUSF has or will prohibit any entity from providing a telecommunications service, either directly or indirectly, as required by the Federal Act § 253 (a).

MCI states that the Arkansas Act impermissibly attempts to preserve revenue streams for ILECs in violation of the 1996 Act.[77] MCI states the Arkansas Act guarantees ILECs the same level of federal universal service funding which they received prior to the passage of the 1996 Act. How the AUSF rules, yet to be adopted, will interpret that text is not known. However, MCI misses the point that the revenue may not come from AUSF support.[78] The lost revenue may come from an increase in the rates for basic local exchange service.[79] Funding from the AUSF is only one potential means of making up lost revenue. MCI appears to assume any funding will

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[75] See Arkansas Act § 4(b).

[76] See 47 U.S.C.§ 253(a).

[77] See MCI Petition p. 13.

[78] See Arkansas Act §§ 4 (e)(4)(A), 4(e)3 (revenue may come from an increase in rates rather than from the AUSF).

[79] See Id.

automatically come from the AUSF. However, the Arkansas law does not require such an outcome. Even if the funding comes from the AUSF, Section 254 (f) of the Federal Act allows separate state support mechanisms.

Even if the funding comes from the AUSF, MCI has not established such AUSF funding would be inequitable, discriminatory, and not competitively neutral. Section 4 (a) of the Arkansas Act states that the AUSF shall be designed to provide predictable, sufficient, and sustainable funding to eligible telecommunication carriers serving rural or high cost areas of the state. This policy is appropriate state policy and should not be preempted by the Commission. The Arkansas PSC has not yet established AUSF rules. It is premature to assume that the AUSF rules will violate the Federal Act.

MCI argues that no provision is made in the AUSF for the competitors of ILECs to receive additional funding. MCI has not established that CLECs would not receive indirect benefits by how the Arkansas PSC establishes wholesale rates after taking in consideration proper revenue streams. Further, § 4 (e)(5) of the Arkansas Act provides that " all eligible telecommunications carriers" may request high cost funding from the AUSF as necessary to maintain rates for universal service that are reasonable, affordable, and comparable between urban and rural areas. [80] A CLEC may be an ETC under the Arkansas Act. A CLEC may receive funding from the AUSF. The petition does not establish that any entity is directly or indirectly prohibited from providing any telecommunication service due to the AUSF.

MCI also argues the Arkansas Act requires a public interest determination for ETCs in non-rural areas in conflict with the Federal Act. The Arkansas PSC has not adopted rules related

[80] See Arkansas Act §4 (e)(5).

to this language. It is not certain to what extent such a review would occur. The review may only require that the entity prove it is a CLEC in good standing. MCI fails to show a material conflict.

MCI argues that the Arkansas Act precludes any rate case or earnings investigation for AUSF support.[81] MCI assumes these words have a particular meaning. However, the ATA understands these words to mean that a traditional rate case or earnings investigation is not justified under universal service funding. However, a separate type of final disclosure is not precluded. Such a distinction between traditional rate cases and lesser reviews are not inconsistent with the Federal Act. Further, MCI argues that the AUSF must use the forward looking economic cost proxies supported by the Commission. Nothing requires a state universal service fund to be precisely like the FUSF. In fact, identical funds might be more likely to burden the FUSF since it would draw from and target identical sources. Further, stranded costs are an important policy consideration for states to monitor and address.

MCI objects to the ILECs being designated ETCs by the Akansas Act. However, the ILECs currently are carriers of last resort in Arkansas. It is not certain if MCI argues that any ILEC in Arkansas does not meet the requirements of the Federal Act for such designation. Unless an ILEC in Arkansas does not meet the federal requirements for being designated an ETC, then preemption should not be considered. Further, in any event, the legislative intent is that the Arkansas Act and Federal Act be read to be consistent. Some review by the Arkansas PSC may be appropriate. For instance, an ILEC must be in good standing.

MCI also states that the Arkansas Act imposes additional requirements on CLECs to be ETCs. However, MCI never distinguishes between ETCs for the purposes of the AUSF and

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[81] See MCI Petition, p. 14.

ETCs for the purposes of the FUSF. Arkansas has a right to create a distinct AUSF. Some provisions in § 5 may only apply to the AUSF. MCI has not established that any AUSF provisions in the Arkansas Act will be placed in AUSF rules in such a way as to violate the Federal Act. Nothing prevents Arkansas from conducting a review in the public interest prior to allowing an entity to receive AUSF funding. Arkansas does not determine the level of FUSF funding available to an ETC. The Arkansas Act does not determine the elements the FUSF will support or the amount of the that support.

MCI objects to the provision in the AUSF that an ILEC's funding shall not be less than a CLEC's funding from the AUSF.[82] However, Arkansas has the right to structure its AUSF based upon reasonable state policy. A CLEC should look at universal service funding available to an ILEC to determine whether it is economically reasonable to build additional facilities. If CLEC's facilities mean greater drain on the AUSF than the ILEC's facilities, then it is not economically wise for Arkansas to support a more expensive plan that duplicates facilities to further drain the AUSF. Such a drain may increase costs and burden universal service in Arkansas without any benefits to Arkansas citizens.

(b) Rural Eligible Telecommunications Carrier Provisions

MCI objects to Arkansas designating a rural LEC as the only ETC in areas served by that rural LEC.[83] Such designation is consistent with the Federal Act. Section 214 (e)(2) provides the states the responsibility of designating ETCs for the purpose of distributing federal universal service support. Section 214 (e)(2) provides that "the state commission **may**, in the case of an

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[82] MCI Petition, p. 17.

[83] MCI Petition pp. 17-18.

area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an [ETC] for a service area designated by the state commission (emphasis added)."[84]

Section 214 (e)(2) is consistent with the designation of a single ETC in a rural telephone company area. The elected members of the Arkansas General Assembly and the governor of Arkansas acted consistently with the requirements of the Federal Act. Although, Arkansas may have designated more than one ETC in a rural area, the Federal Act does not require Arkansas to allow additional ETCs in rural areas. The decision to promote universal service by allowing only one ETC in a rural area in Arkansas is reasonable. Arkansas is a very rural state. The Arkansas General Assembly is in a position to determine how to best to support universal service needs in Arkansas. The Federal Act did not require Arkansas to designate more than one ETC. The policy of Arkansas, consistent with the Federal Act, is to allow only one ETC. Such a decision is a reasonable use of discretion allowed Arkansas in § 214(e) 2.

E. THE ARKANSAS PSC'S AUTHORITY OVER ARBITRATIONS AND AGREEMENTS SHOULD NOT BE PREEMPTED.

MCI has not argued the Arkansas PSC has violated any of the provisions of the Federal Act. MCI has not established the Arkansas PSC has taken action which has had the effect of prohibiting an entity from providing any telecommunications service. The Arkansas PSC has approved interconnection agreements since the effective date of the Arkansas Act. Section 252 (e)(5) permits the Commission involvement in interconnection proceedings only when a state fails to act. The actions taken by the Arkansas PSC to approve interconnections and act on related

[84] Federal Act § 214 (e)(2).

matters establish the Arkansas PSC has not failed to act. The Arkansas PSC's authority should not be preempted.

CONCLUSION

MCI fails to establish any material violation of any provision of federal law that would justify the preemption of the Arkansas Act by the Commission. The Commission should deny the petition of MCI.

Respectfully submitted,

ARKANSAS TELEPHONE ASSOCIATION

BY: George Hopkins

GEORGE HOPKINS
Attorney at Law
P.O. Box 913
804 E. Page Avenue
Malvern, AR 72104
(501) 332-2020
Ark. Bar No. 87-085

Arkansas Telephone Association
Members:

ALLTEL Arkansas, Inc.
Arkansas Telephone Co.
Central Arkansas Telephone Cooperative
Century Telephone of Arkansas
Century Telephone of Mountain Home
Century Telephone of Redfield
Century Telephone of South Arkansas
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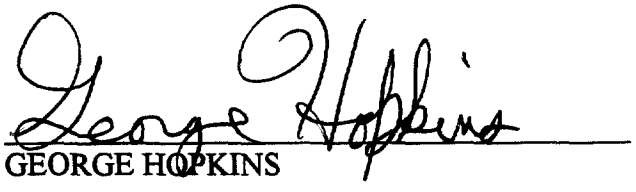
Yelcot Telephone Company
Yell County Telephone

CERTIFICATE OF SERVICE

I, George Hopkins, do hereby certify that the foregoing comments of the Arkansas Telephone Association have now been served on this 3rd day of July, 1997, to the parties of record as listed.



GEORGE HOPKINS

Mr. Riley M. Murphy
Mr. Charles H. N. Kallenbach
American Communications Services, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, Maryland 20701

Mr. Brad E. Mutschelknaus
Mr. Danny E. Adams
Ms. Marieann Z. Nachida
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

Ms. Janice Myles
Common Carrier Bureau
FCC Room 544
1919 M. Street, N.W.
Washington, D.C. 20554

ITS, Inc .
2100 M. Street N. W.
Suite 140
Washington, D.C. 20037

NATCO
Mr. Benjamin Dickens
Mr. Gerald Duffey
Broeston, Mondkofsky, Jackson & Dickens
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

ALLIANT COMMUNICATION
Mr. Robert A Mayer
Vinson & Elkins
1455 Pennsylvania Avenue N.W.
Washington, D.C. 20004-1008

ARKANSAS ATTORNEY GENERAL
Winston Bryant
0Ms. Vada Berger
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, AR 72201

SPRINT COMMUNICATIONS CO.Mr.
Mr. Leon M. Kettenbaum
Mr. Keny Y. Hakamura
1850 M. Street N. W., Suite 1110
Washington, D.C. 20036

Association for Local Telecommunications Services
Ms. Emily Williams
1200 19th Street N. W.
Washington, D.C. 20036

Telecommunications Resellers Association
Mr. Charles C. Hunter
Hunter Communications Law Group
1627 I Street N. W. , Suite 70
Washington, D.C. 20066

Richard McKenna HQEO3J36
Post Office Box 152092
Irving, TX 75015-2092

SWBT
Mr. Garry S. Wann
1111 West Capitol, Room 1005
P.O. Box 1611
Little Rock, AR 72203

Mr. Martin E. Grambow
1401 I Street, N.W. Sutie 1100
Washington, D.C. 20005

Mr. Michael K. Kellogg
Mr. Austin C. Schlick
Mr. Geoffrey M. Klineberg
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 100- West
Washington, D.C. 20005

Lisa B. Smith
MCI Telecommunications Corp.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Mr. Durward D. Dupre
Mr. Michael J. Zpevak
One Bell Center, Room 3520
St. Louis, MO 63101

Mr. James D. Ellis
Mr. Robert M. Lynch
175 E. Houston, Room 1262
San Antonio, Texas 78205

AT&T Corp.
Mr. Roy E. Hoffinger
Mr. Mark C. Rosemblum
Mr. Stephen C. Garavito
295 N. Maple Avenue
Room 3249J1
Basking Ridge, NJ 07920

Donald B. Verrill
Jodie L. Kelley
Jenner & Block
601 Thirteenth Street, N.W.
Suite 1200
Washington, D.C. 20006

MCI
Ms. Amy G. Zinkle
1801 Pennsylvania Avenue N.W.
Washington, D.C. 20006